IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Pursuant to Supreme Court Rule 7, Paragraph 3, United Air Lines, Inc., Appellant (hereinafter referred to as "United") files this its brief opposing the Motion to Dismiss or Affirm of the Public Utilities Commission of the State of California, heretofore filed herein and served on United on November 14, 1951, and states as follows:

I.

THIS APPEAL PRESENTS SEVERAL SUBSTANTIAL FEDERAL QUESTIONS.

A. The Order of the Commission, Which Regulates Fares Charged Both Interstate and Intrastate Passengers by United, Is Beyond the Commission's Jurisdiction and Is in Direct Conflict With Federal Legislation.

The Motion of the Public Utilities Commission of the State of California (herein referred to as the "Commission") contains a significant admission which demonstrates not only that the federal questions involved in this appeal are substantial but that the Commission's reparation order of April 24, 1951, as applied to United, is beyond the Commission's jurisdiction. The record shows, and the Commission concedes (Motion, pp. 1-2), that a substantial number of persons carried by United on its air coach flights between the Los Angeles and San Francisco Bay areas are passengers whose flight between those areas is only one segment of an interstate journey. Some of those passengers travel on through coach tickets between the Los Angeles area and Portland, Oregon, and Seattle, Washington. Others travel on a local air coach ticket between the Los Angeles and San Francisco Bay areas but either originate or terminate their journeys outside the State of California. The Commission's order clearly covers all persons in this latter group, as well as all other passengers, who traveled *via* United on local air coach tickets between the Los Angeles and San Francisco Bay areas during the period from March 1 to May 9, 1951.

Paragraph 2 of the Commission's order directs United, among others, to make reparation, wherever possible, "to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand and

the Los Angeles area airports on the other hand." The order is not limited to intrastate passengers (defined by the Commission as those persons whose entire journeys are within the State of California). It is evident from the broad scope of the Commission's investigation and from the position taken by its counsel at the hearing that the Commission did and always intended to assert jurisdiction over *all* passenger traffic, both interstate and intrastate, which was carried by United on local air coach tickets between the Los Angeles and San Francisco Bay areas. At the conclusion of the hearing on March 27, 1951, the Commission's staff moved that the Commission promptly issue a preliminary order, requiring United, among others, to cease and desist charging passenger fares "for airline coach travel between the said Los Angeles area and the said San Francisco area in excess of the authorized fares set forth in their tariffs on file with the Commission until such time as the Commission orders otherwise."

It is therefore clear that the Commission, by its order, sought to exercise jurisdiction over all of United's interstate passengers traveling on a local air coach ticket between the Los Angeles and San Francisco Bay areas. The Commission in its Motion now concedes that it lacks such jurisdiction, but "takes the position" that it's order does not pertain to such passengers. The breadth of the Commission's order, however, cannot be narrowed by a position taken on brief. The broad and definitive order itself, issued pursuant to the alleged authority of Article XII, sections 20 and 22, of the California Constitution, remains inclusive and unamended. Whether those sections, as thus interpreted, are repugnant to the Constitution of the United States, Article I, Section 8, and the 14th amendment thereof, Section 1, and are further in conflict with and repugnant to the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401, *et seq.*), are substan-

tial federal questions. Whether or not an interstate air carrier such as United, holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board of the United States, pursuant to the Civil Aeronautics Act of 1938, as amended, is subject to the regulatory control, with reference to its rates, fares, and charges, of a state in which a portion of its operations are conducted, and if so, whether such control extends to interstate traffic carried by such a carrier, are important questions of federal law which have not been but which should be settled by this Court to promote orderly regulation, development and expansion of air commerce in the United States.

It is no answer to say, as the Commission has said in its Motion (pp. 9-11), that while denying the Commission's jurisdiction over its rates United is willing to take the benefit of Commission authorization of the increased fare between the Los Angeles and San Francisco Bay areas, and that United's action in filing tariffs with the Commission "prove a clear recognition" of the Commission's lawful authority to regulate its intrastate fares. United has never considered that the Commission's rate regulating activities were being performed for its benefit. It has complied with previous Commission demands in the now exploded hope that by such compliance it could avoid litigation. If such compliance ever constituted consent to the Commission's jurisdiction, which United denies, the law is clear that the consent of parties cannot give jurisdiction to a public administrative body where the law itself does not confer it.

> *East Ohio Gas Co.* v. *Federal Power Commission*, 173 F. 2d 429, 434-435 (C. A. D. C. 1948), reversed on other grounds 338 U. S. 464 (1950); 73 C. J. S., Public Administrative Bodies and Procedure, § 116.

That the Commission's jurisdiction does not extend to

the regulation of fares charged interstate passengers by United is plain.

> *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S. 557, 577 (1886).

In the *Minnesota Rate Cases,* 230 U. S. 352 (1913), this Court said (399, 401):

> "There is no room in our scheme of Government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. * * * They [the States] have no power * * * to prescribe the rates to be charged for transportation from one State to another. * * *"

With respect to air transportation, the power of fare regulation has been fully exercised by Congress and granted comprehensively to the Civil Aeronautics Board. Pursuant to sections 1(10) and 1(21) of the Civil Aeronautics Act of 1938, *supra,* "air transportation" includes interstate air transportation, and "interstate air transportation" includes

> "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—(a) a place in any State of the United States or the District of Columbia, and a place in any other State of the United States, or the District of Columbia * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Section 403 of that Act (52 Stat. 992, 49 U. S. C. 483) requires that every air carrier (which term is defined in section 1(2) to mean any United States citizen who under-

takes to engage in air transportation) shall file with the Civil Aeronautics Board "tariffs showing *all* rates, fares, and charges for air transportation *between points served by it*," and provides that no air carrier shall charge a greater or less or different compensation for air transportation than the fares specified in its currently effective tariffs. [Emphasis added.]

It is also clear, as the Commission has conceded, that passengers traveling between the Los Angeles and San Francisco Bay areas on one leg of an interstate journey are interstate passengers even though on that leg they pay only the local fare for transportation between those two points. It has, of course, long been established that a continuous interstate journey, which takes place by different forms of transportation, is interstate commerce from start to finish, and that a carrier engaged in that commerce, however limited such commerce may be, is to that extent subject to the legislation of Congress.

> *The Daniel Ball*, 10 Wall. (77 U. S.) 557, 565 (1870).
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> *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228 (1947).

This Court has held that it is the intention of the passenger or the shipper, as the case may be, not the form of his ticket or bill of lading, which determines the character of the commerce as interstate or intrastate. The rule is thus stated in *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349 (1917):

> "As this Court has often said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

In *Sprout* v. *City of South Bend, Ind.*, 277 U. S. 163 (1928), a case involving the status of bus passengers, this Court stated (168):

"The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce."

In *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166 (1922), the facts were that an interstate shipment was made to Oakley, Ohio, at which point the shipper took possession and reshipped to Madisonville, Ohio, paying a local rate on that intrastate leg of the shipment, although it had been his intention from the beginning that the shipment should go to Madisonville. There this Court said (171):

"Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply."

Accordingly, it was concluded that the through interstate rate was the only lawful rate and that (172):

"To permit the applicable through interstate rate to be defeated by use of a combination of intermediate rates would open wide the door to unjust discrimination. And it would unjustly deplete the revenues of the carrier."

Other Courts, both State and Federal, have recognized that the intention of the passenger, not the form of his ticket, determines his status as an interstate or an intrastate passenger.

Nast v. *San Antonio U. & G. Ry. Co.*, 261 S. W. 1011 (Tex. Com. App. 1924).

Illinois Cent. R. Co. v. *Holman*, 106 Miss. 449, 64 So. 7, 8 (1914).

Bush v. *Bremmer*, 36 F. 2d 189, 191 (C. C. A. 8, 1929).

Missouri K. & T. Ry. Co. v. *Ashinger*, 63 Okla. 120, 162 Pac. 814, 818 (1916).

Boston and M. R. R. v. *Cate*, 254 Mass. 248, 150 N. E. 210 (1926).

By issuing an order permitting the Civil Aeronautics Board to examine pertinent documents and records of an airline operating wholly within the State of New York, the Federal District Court in *Civil Aeronautics Board* v. *Canadian Colonial Airways*, 41 F. Supp. 1006 (S. D. N. Y., 1940), recognized the possibility that a physically intrastate air operation may be subject to the economic jurisdiction of the Board if it carries passengers on one leg of an interstate journey even though all of the airline's passengers traveled on local tickets between intrastate points. Subsequent to the decision in that case, the carrier concerned submitted to the entry of a consent decree permanently enjoining its operation (1941 Annual Report, Civil Aeronautics Board, pages 35-36).

The following question is therefore an important one raised by this appeal:

Is the Commission's order, insofar as it covers passengers on one leg of an interstate journey who paid local air coach fares for air transportation *via* United between the Los Angeles and San Francisco Bay areas in conflict

with federal regulation and beyond the Commission's jurisdiction?

This question is both substantial and federal and invites an authoritative decision by this Court.

B. The Order of the Commission, as Applied to United, Places Such a Direct Burden on Interstate Commerce as to Constitute a Violation of the Interstate Commerce Clause of the Constitution of the United States.

The second question set forth by the Commission (Motion, p. 8) as defining the issues before the Court in this appeal requires expansion. Stated accurately, the question is:

Does the order of the Commission regulating the fares charged interstate and intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I)?

This is the first time that question has been presented to this Court in connection with air transportation. It is a highly substantial federal question. As it relates to interstate air commerce, the question of the burden placed upon such commerce by state regulation is in a number of ways unique. Precedents established in other fields of transportation provide no sure basis for decision here. In *Chicago & Southern Air Lines* v. *Waterman S. S. Corporation*, 333 U. S. 103 (1948), this Court said (108):

> "However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

The Civil Aeronautics Board, through its Vice-Chairman Mr. Oswald Ryan, in a letter to the Director of the Aeronautics Commission of Indiana dated February 12, 1947, stated that appeals to the courts:

> "would, we believe, ultimately establish the principle that air transportation is so essentially national in character that any state regulation of this branch of the industry would constitute an improper burden upon interstate commerce." State Regulation of Economic Phases of Air Transportation—Views of the CAB, 14 Journal of Air Law and Commerce 356, 357 (1947).

The Commission in its motion has not treated the question of burden at all. Its discussion under the heading related to that question is limited to an attack upon the applicability of the well-established doctrine of Uniformity of Regulation and upon the contention that Congress has pre-empted the field of air carrier regulation—both questions presented by this appeal but quite separate from the question of burden (Motion, pp. 11-14).

The law is clear that under no circumstance can a State impose a direct burden on interstate commerce, and that if a State statute does impose such a burden the statute must fall even though Congress has not pre-empted the field.

> *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557, 571 (1886).
>
> *Minnesota Rate Cases*, 230 U. S. 352, 396, 400 (1913).

That such a burden may be present here seems apparent merely by reference to the following considerations:

1. If the Commission's views as to the scope of its authority were to prevail there could be two local air coach fares between the Los Angeles and San Francisco Bay areas in effect and binding on United at the same time, one applying to an interstate passenger (defined by the Com-

mission as one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey) and the other applying to an intrastate passenger (defined by the Commission as one whose entire journey is within the State of California) (Motion, pp. 7-8). The first fare would be subject to federal regulation, the second to state. Thus, if the Commission's interpretation of its power is correct, during the period from March 1 to May 9, 1951, United could not have charged an interstate passenger between Los Angeles and San Francisco less than $11.70 nor an intrastate passenger more than $9.95. United would have been faced with the impossible burden of distinguishing between the two types of passengers—each asking for the same local ticket between Los Angeles and San Francisco. Presumably, it could have inquired of each person purchasing a ticket whether he or she was an interstate or an intrastate passenger, but if the passenger had refused to disclose that information or had given the wrong information, United in most instances would have had no way of knowing the correct fare to charge and would act at its peril.

2. In determining the rates of compensation for the transportation of mail by aircraft the Civil Aeronautics Board is required by the Civil Aeronautics Act to take into consideration the need of the particular air carrier concerned for compensation for the transportation of mail sufficient "together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (Sec. 406(b), 52 Stat. 998, 49 U. S. C. 486). If a State may regulate the rates charged by such a carrier for the intrastate portion of its passenger traffic* and thus have it

* United provides scheduled air service between 136 pairs of cities in California alone.

within its power to compel a reduction in the carrier's "other revenue", the amount of mail revenue required will mount correspondingly. The direct burden of such regulation on this vital phase of interstate commerce, and indeed on the federal treasury itself, is therefore immediately apparent.

C. The Commission's Order Assumes Jurisdiction Over a Field of Economic Regulation of Air Carriers Engaged in Both Interstate and Intrastate Commerce Which Has Been Pre-empted by Congress Through the Civil Aeronautics Act of 1938.

The Civil Aeronautics Act contains a comprehensive grant of federal authority to the Civil Aeronautics Board which is invaded by the Commission's order. With reference to that Act, this Court stated in *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 105, 107 (1948):

> "Congress has set up a comprehensive scheme for regulation of common carriers by air * * *. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past."

Speaking broadly concerning the exclusiveness of federal control over air commerce, Mr. Justice Jackson stated, in a concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303 (1944):

> "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Air

> as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

The Declaration of Policy section of the Civil Aeronautics Act of 1938 (Section 2, 52 Stat. 980, 49 U. S. C. 402) requires the Board to consider, as being in the public interest and in accordance with the public convenience and necessity, the encouragement and development of an air transportation system properly adapted to the present and future needs of the domestic commerce of the United States, of the Postal Service, and of the national defense. With reference to that broad power, the court in *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* ..... F. 2d ....., 3 Avi. 17,702 (C. A. D. C. 1951) stated:

> "In the first place, Congress expressly directed that the Board consider, as being in the public interest and in accordance with the public convenience and necessity, the development, encouragement and promotion of air transportation, air commerce, and civil aeronautics. Whatever belittling significance may be attached to the fact that those provisions were under a title 'Declaration of Policy', they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute. Obviously development, promotion and encouragement are matters of foresight, not products of unblended hindsight."

In addition to its broad promotional powers, this Board is specifically required, in exercising its power "with respect to the determination of rates for the carriage of persons or property" to take into consideration the need in the public interest of adequate and efficient transportation of persons and property by air carriers and the need of each air carrier for revenue sufficient to enable such

carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service (Sec. 1002 (e), 52 Stat. 1018, 49 U. S. C. 642). The amount of revenue needed to provide adequate and efficient air service and to promote the development of an air transportation system properly adapted to the needs of commerce, the Postal Service, and the national defense—the tests prescribed by Congress for use in rate determination—may be substantially in excess of that thought necessary by a State public utilities commission, whose consideration may be limited to the question whether the rate is confiscatory. Congress could hardly have intended the tests it prescribed for use in rate making to be applicable only to a portion of the traffic carried by an air carrier engaged in both interstate and intrastate commerce. Such an interpretation of its action would frustrate the fundamental purpose of its legislation—the development of a sound national air transportation system.

The extent to which these broad grants of power to the Civil Aeronautics Board have pre-empted the rate regulatory authority which the States might otherwise exercise over air carriers engaged in interstate commerce and in the transportation of the United States mail is a question that no federal court has yet passed upon.

Admittedly the Civil Aeronautics Act provides no clear answer to this question. That is why this appeal is necessary. The Commission has referred the Court to a number of bills which have been introduced in Congress from time to time in an effort at clarification (Motion, pp. 17-18). Since none of those bills has as yet been enacted into law, however, this appeal is and must be concerned with an interpretation of the Act as presently written.

By seeking this appeal, United is not presenting "a bold attack upon our Federal form of government" as

the commission would have this Court believe (Motion, p. 19). United is seeking this appeal for the sole purpose of clarifying the existing confusion which exists as to the relative spheres of State and Federal regulatory control over its rates.

II.

COMPLIANCE BY UNITED WITH THE REPARATION ORDER OF THE COMMISSION WOULD VIOLATE THE PROVISIONS OF SECTION 403(b) OF THE CIVIL AERONAUTICS ACT OF 1938 (49 U. S. C. 483(b)) AND WOULD DEPRIVE UNITED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

As already observed, paragraph 2 of the Commission's reparation order applies to all of United's passengers paying local air coach fares for transportation between the Los Angeles and San Francisco Bay areas between the period from March 1 to May 9, 1951, and such passengers concededly included interstate passengers—*i. e.*, those whose flight between those areas was but one leg of an interstate journey. With respect to each such passenger United was prohibited by Sec. 403(b) of the Civil Aeronautics Act of 1938 as amended (52 Stat. 992, 49 U. S. C. 483) from charging or receiving less than the $11.70 specified in its then currently effective tariffs on file with the Civil Aeronautics Board. With respect to such passengers, United was forbidden by federal law from complying with the Commission's reparation order. Since the Commission was therefore clearly outside its jurisdiction in entering such order, the order unconstitutionally deprives United of its property without due process of law in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

United's voluntary actions have not created the situation in which it now finds itself, despite the Commission's assertion to the contrary (Motion, p. 20). Los Angeles and

San Francisco are both points served by United, and since United provides air transportation between those points as defined in the Civil Aeronautics Act (Sections 1(10), 1(21), 52 Stat. 977, 49 U. S. C. 401) its tariff showing the local fare between them was required by that Act to be filed with the Civil Aeronautics Board. United increased its air coach fare between those points from $9.95 to $11.70, effective March 1, 1951, on the specific recommendation of the Board that an increase in that amount be published to take effect on that day. As previously noted, the California Commission at the time that increase became effective, as well as at the time it entered its reparation order on April 24, 1951, was insistent that it had *exclusive* jurisdiction over that fare. The dilemma in which United found itself was therefore clearly not the result of United's voluntary action. Even if the Commission at that time had taken the position it takes today—that it has jurisdiction over the local fare only insofar as it applies to passengers whose entire journey is within the State of California—United would have been in an equally impossible dilemma clearly not the result of choice. For as has already been observed, United has no practical way of ascertaining which of its local-fare air coach passengers between the Los Angeles and San Francisco Bay areas are engaged on an interstate journey and which are not. Passengers are not under oath. Yet United in many instances would have to sell tickets on the sole reliance of a passenger's word, and at the peril of being in violation of both federal and state law if it made a mistake. The law is clear that the fact that a carrier may not have knowledge of the interstate character of its traffic does not change the character thereof.

Missouri-Kansas-Texas R. Co. v. *Northern Oklahoma Rys.*, 25 F. 2d 689, 697 (C. C. A. 8, 1928), cert. den. 278 U. S. 610 (1928).

B. & O. S. W. R. R. v. *Settle*, 260 U. S. 166 (1922).

III.

THE AVAILABILITY OF A PETITION FOR REHEARING OF THE CALIFORNIA SUPREME COURT'S ORDER BELOW DOES NOT AFFECT THAT ORDER'S FINALITY.

The question raised on page 6 of the Commission's motion as to whether United could have filed a petition for rehearing in the California Supreme Court following that Court's order declining review can be put to rest summarily. Regardless of whether a petition for rehearing is appropriate or possible under California procedure when the Supreme Court of that State has declined to review an administrative order, it is clear beyond doubt from the decisions of this Court that "finality" is in no wise affected by the possibility that the rendering court might reopen or revise its judgment.

Market St. Ry. Co. v. *Railroad Commission*, 324 U. S. 548 (1945).

IV.

CONCLUSION.

United respectfully submits that the questions presented in this appeal are substantial federal questions entitling United to invoke the jurisdiction of this Court.

WHEREFORE Appellant respectfully requests this Court to allow this appeal and to deny the motion of Appellee, The Public Utilities Commission of the State of California, to dismiss or affirm.

DATED at Los Angeles, California, December 6, 1951.

Respectfully submitted,

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